IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7861 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.H.WAGHELA

and

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SOLITAIRE MACHINE TOOLS LTD

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 7861 of 2003
MR. Mihir Joshi with Mr. NITIN K MEHTA for Petitioners.
MR DN PATEL for Respondents.

CORAM : HON'BLE MR.JUSTICE D.H.WAGHELA
and
HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 10/11/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE K.A.PUJ)

Rule. Mr. D.N. Patel, the learned Senior Standing Counsel appearing for the respondents waives service of the Rule.

2. The short point involved in the petition is as to whether the respondent No.2, i.e. Assistant Commissioner of Central Excise & Customs, is justified in rejecting the petitioner's claim of refund of duty of Rs. 23,78,149/- paid by the petitioner under protest as a result of the order passed by the Commissioner (Appeals), Mumbai, on 17.7.1997 in Appeal No. GS/102/BRD/97. The said order was challenged by the petitioner in appeal before the CEGAT and the said appeal was allowed by the CEGAT on 13th November 2002.

3. It is the case of the petitioner that the petitioner was a 100% Export Oriented Unit which started its commercial production from 9.9.1988. The petitioner applied for debonding of unit and accordingly was granted permission vide letter No. 262/1996 dated 2.12.1996 issued by Secretariat of Industrial Approval, Ministry of Industry, New Delhi. The Assistant Commissioner of Central Excise, Division-1, Vadodara passed an assessment order on 28.2.1997 and assessed the duty payable at Rs. 3,23,62,120.07.

4. Being aggrieved by the said order, the petitioner preferred an appeal before the Commissioner (Appeals) which was decided on 17.7.1997 and the duty amount was reduced to Rs. 50,80,055.76. The petitioner having already paid the admitted liability of Rs. 27,01,906.70, and being aggrieved by the Commissioner (Appeal)'s order decided to prefer an appeal against it. Accordingly, it paid the balance amount of Rs. 23,78,149/- under protest and in lieu of pre-deposit to the appeal to CEGAT, vide TR-6 Challans No. 02/97-98 dated 25.7.1997 of Rs. 6,67,721/- and No. 05/97-98 dated 28.7.1997 of Rs. 17,10,428/-. In both these challans, it is the case of the petitioner that due to distortion during fax transmission the appeal No. GS/147/BRD/97 has been mentioned instead of GS/102/BRD/97. The appeal preferred by the petitioner before the Tribunal against the order of the Commissioner (Appeals) was decided in favour of the petitioner and the Tribunal ordered refund of the duty paid under protest being the amount of Rs. 23,78,149/-.

5. Pursuant to the said order, the petitioner applied for refund on 23.12.2002 to the Assistant Commissioner, Central Excise and Customs. The Assistant Commissioner had however rejected the said claim of the petitioner vide his order dated 7.4.2003 on the ground that despite the issuance of the notice the petitioner did not remain present and clarify the discrepancy in the appeal number.

6. It is the case of the petitioner that the petitioner has, already, clarified the said discrepancy vide written submissions filed before the Assistant Commissioner on 25.3.2003. Even after passing of the said order, the petitioner has brought it to the notice of the Assistant Commissioner vide letter dated 25.4.2003 and further reminder was also sent on 15.5.2003. However, the grievance of the petitioner was not redressed and hence the petitioner has filed the present petition before this Court invoking the extraordinary writ jurisdiction under Article 226 of the Constitution of India.

7. Mr. Mihir Joshi, ld. advocate appearing for the petitioner along with Mr. Nitin Mehta, the learned Advocate submits that the petitioner had inadvertently and due to distortion of fax transmission, stated in the TR-6 Challans the order number as GS/147/BRD/97 instead of GS/102/BRD/97. He has further submitted that simply because there was some typographical error the petitioner's claim for refund should not have been refused, especially when he succeeded in appeal before the CEGAT. He has further submitted that the petitioner has not made any application for waiver of pre-deposit and there was no order waiving the condition of pre-deposit for entertaining the appeal before the CEGAT as stipulated in Section 129E of the Customs Act, 1962. He has further submitted that the amount paid was treated as pre-deposit against the order in appeal and the CEGAT has entertained and decided the said appeal against the said order and the refund of the amount ought to have been granted to the petitioner. On the date of filing of the petition, the petitioner has claimed the interest at the rate of 15% of Rs. 1,99,370/-. The petitioner has also moved draft amendment during the course of hearing stating that the amount of interest should be granted at the appropriate rate till the date of payment of the refund amount.

8. In support of his claim, Mr. Joshi relied on the decision of this Court in the case of Parle International Ltd vs. Union of India - 2001 (127) ELT 329 (Guj.)

wherein this Court has taken the view that "substantive right to get the refund arose in view of the order passed by the Tribunal. Under these circumstances, it is very clear that there is no question of following the procedure laid down under Section 233B and therefore, that would not disentitle the assessee from recovering the amount paid and recovered by the Department in contravention of law. This is only a deposit which was made with a view to avoid interest if ultimately it is held that the petitioner is liable to pay the amount demanded. It cannot be said that the assessee has recovered from its customers the amount subsequently deposited with the Revenue and thus enriched itself by collecting such amount from the customers. Therefore the Revenue is required to refund the amount of deposit with interest from the date of order of CEGAT."

9. Mr. DN Patel, ld. Senior Standing Counsel for the department submits that though opportunity was granted by the respondent to the petitioner the same was not availed of and hence the present order was passed. He has further submitted that the petitioner may be directed to approach the Assistant Commissioner and place his case before him so that appropriate order can be passed.

10. Having heard the ld. counsel appearing for the respective parties and after having gone through the impugned order, we are of the view that the petitioner's claim cannot be rejected simply because there was some error in mentioning the appeal number. It is an admitted position that there was no separate appeal filed by the petitioner in respect of order No. GS/147/BRD/97. Once the Tribunal has reversed the order passed by the Commissioner, the petitioner became entitled to the refund of duty with interest and it is obligatory on the part of the respondent authorities to grant refund with interest. Here in this case, the Assistant Commissioner has rejected the claim only on the ground that the petitioner paid duty vide Challan No. 02/97-98 dated 25.9.1997 and 5/97-98 dated 28.7.1997 under protest clearly mentioning as "payments of balance duty in terms of Order-in-Appeal No. GS/147/BRD/97 dated 17.7.97", whereas the refund claimed by the assessee on the basis of the CEGAT's Final Order No. CB/260-61/2002-WZB dated 13.4.2002 is arising out of Order-in-Appeal No. GS/102/BRD/97 dated 17.7.97 which is not relevant to the duty paid under protest by the assessee." There is no justification for passing such order and hence we are of the view that the said order is absolutely unjust, improper and not tenable at law. If there is an apparent

error on the part of the assessee because of distortion in Fax transmission, the assessee should not be made to suffer. The opening observations of the Division Bench of Bombay High Court in Nelco Ltd. vs. Union of India - 2002 (144) ELT 56 (Bom.) squarely apply to the present case and require to be reproduced as under;

> "We come across cases of citizens trying to dodge their revenue dues by resorting to endless series of litigation. This time the boot is on the other foot. It is Revenue which is trying to dodge and postpone the evil day."

In the facts of the present case, not only the petition is contested by filing a detailed affidavit but a technical plea is advanced to suggest that the petitioner ought to have resorted to the alternative remedy which can only result into wasteful litigation and delay.

11. In the aforesaid view of the matter, we direct the authority to refund the amount of Rs. 23,78,149 as claimed in the petition along with interest at the rate of 8% from the date of order of CEGAT in tune with the Notification published under Section 27-A of the Customs Act, even though the provisions of said Section strictly did not apply to the facts of the case, within a period of three months after which the total amount then due shall carry interest at the rate of 15%. The petition is accordingly allowed and Rule made absolute to the aforesaid extent with costs which is quantified at Rs. 2,500/- to be paid to the petitioner by the respondent No.2.

[D.H. Waghela, J.]

rmr. [K.A. Puj, J.]